PHOENIX HEIGHTS ESTATE PTE. LTD.

v.

LEE KAY GUAN & ANOR.

PRIVY COUNCIL
LORD RUSSELL OF KILLOWEN
LORD SCARMAN
LORD ROSKILL
LORD BRIGHTMAN
SEBAG SHAW
[APPEAL NO. 15 OF 1979]
26 MAY 1982

LAND LAW: *Housing Developers - Sale and purchase agreement - Delay in completion - Provision for payment of liquidated damages - Whether valid - Notice of completion - Whether agreement for liquidated damages directed to different categories of breach.*

This was an appeal against the decision of the Court of Appeal, Singapore which gave judgment for the respondents in a claim for liquidated damages for the delay in completion of a dwelling house.

On 6 January 1973 a written agreement was made between the appellant and the respondents for the sale to the purchasers of a plot and for the erection thereon of a detached dwelling house in a housing estate. The purchase price was $180,000 payable by instalments as the building advanced. Under cl. 11 of the agreement the appellant had to give notice to complete to the respondents. Such notice to be accompanied by the appellant's architects' certificate that the building and road drainage and sewerage works have been completed in accordance with the relevant approved plans and that the said approval of the competent authority for subdivision had been obtained. The said notice to complete was to have been given by the appellant on or before 30 June 1973 or such other subsequent date or dates as may after the date thereof be appointed by the Controller of Housing which was subsequently appointed as 31 December 1973.

Under cl. 11 of the agreement the appellant should pay to the respondents liquidated damages calculated from day to day in respect of the period commencing from the appointed date up to the date when the said notice to complete shall be given at the rate of 9% p.a. on the purchase price.

The Court of Appeal had allowed the claim of the respondents for liquidated damages for the delay on the part of the appellant in completing the building for the period from the date a licence for the temporary occupation of the building was given on 28 November 1974 to the completion date on 7 December 1975. The High Court had earlier on 1 April 1977 given leave to the respondents to enter judgment against the appellant in a sum representing 9% p.a. on the purchase price from 31 December 1973 the date appointed by the Controller of Housing to the date the temporary occupation licence was given on 28 November 1974 and then gave leave to proceed to trial for the balance of the claim calculated over the period from 28 November 1974 to 7 December 1975. However, when the action came up for trial, the High Court disallowed the claim and the respondents appealed to the Court of Appeal which gave judgment in favour of the respondents. Hence, this appeal.

Held:

[1] The wording of cl. 11 is plain. Damages are to be "calculated from day to day in respect of the period commencing from the appointed date up to the date when the said notice to complete shall have actually been given." The appellant cannot curtail the right of the respondents to liquidated damages by making an offer of possession when the licence for the temporary occupation of the building was given which the respondents were not bound to accept before completion.

[2] The agreement for liquidated damages was not directed to different categories of breach of contract, but to a single sort of breach namely, a delay in serving notice to complete.

[3] The offer of vacant possession before completion was never a part of the sale agreement but was an event altogether outside the contract. It cannot therefore be taken into account in assessing the validity of the agreement for compensation for delay in serving a notice to complete.

[4] The appellant's agreement, the assumption by the respondents of possession caused liquidated damages to cease to accrue on the possession date is unsound. It was not asserted that the offer and acceptance of premature possession gave rise to any implied variation of the sale agreement, or any waiver of the right to interest after the possession date.

[Appeal dismissed with costs.]

Cases referred to:
Rowe v. School Board for London [1887] 36 Ch D 619
Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd. [1915] AC 79

Legislation referred to:
Housing Developers Rules 1967 [Sing], r. 9(A)
Local Government (Building) Regulations 1966 [Sing], reg. 34(1)

For the appellant - Desmond Wright Q.C. & Peter Guok
For the respondents - Stuart Mc Kinnon Q.C. & Stephen Auld.

JUDGMENT

Lord Brightman:

This appeal from the Court of Appeal of Singapore raises a short point on a contract for the sale of land: whether a provision in the contract for the payment of liquidated damages in the event of the vendor's delay in completion is valid, and, if so, to what extent it applies on the facts of the instant case.

In or about 1971 the appellant ("the vendor") started to develop a building estate in Singapore known as the Phoenix Heights Estate. Phase 2 of the development consisted of the erection of some 100 buildings for use as houses, flats and shops.

Such a development is governed by certain ordinances and regulations, to some of which it is necessary to refer. Under s. 9(1) of the Planning Act, the development of land requires the permission of the competent authority. Under sub-section (3) of that section the "sub-division" of land requires a similar permission. "Sub-division" has a defined meaning in the Act, but for present purposes, it is sufficient to say that this sale, being a part disposal of the vendor's estate, involved a subdivision.

The Local Government (Building) Regulations 1966 deals with fitness for occupation. Under reg. 34(1) a certificate of fitness for occupation of a building is to be given when (shortly stated) the Chief Building Surveyor or his authorised officer has inspected the building and

is satisfied that it conforms with the approved plans. Under sub-rule (3) it is unlawful for a person to occupy a building, or to permit it to be occupied, unless a certificate of fitness for occupation has been issued. There is, however, a proviso

> that the chief building surveyor may in his discretion grant a licence for the temporary occupation of such building for a period not exceeding six months, in cases where only minor deviations from the approved building plans in respect thereof have been made and pending full compliance with the requirements of the chief building surveyor before the issue of a certificate of fitness.

Lastly it is necessary to refer to the Housing Developers Rules 1965, which were made under the Housing Developers (Control and Licensing) Ordinance 1965, and were amended by the Amendment Rules of 1967. Rule 9(A) of the amended Rules provides (sub-rule 1) that an agreement for sale between a housing developer and a purchaser shall be in the form prescribed in a schedule thereto, and (sub-rule 2) that no amendment, deletion or alteration to any such form shall be made except with the approval of the Controller of Housing.

On 6 January 1973 a written agreement ("the sale agreement") was made between the vendor and the respondents ("the purchasers") for the sale to the purchasers of a plot forming part of the Phoenix Heights building estate, and for the erection thereon of a detached dwelling house which came to be known as No. 8 Phoenix Garden. The sale agreement followed the prescribed form.

The purchase price was $180,000 payable by instalments as the building advanced. The payment of the final instalment was regulated cl. 3(h) in the following terms -

> On completion of the sale and purchase herein as hereinafter provided and on delivery to the purchaser of vacant possession of the property sold the balance of 10% of the purchase price, 5% of which shall forthwith be paid to the vendor and the remaining 5% shall be paid to the purchaser's solicitors as stake-holders to be paid to the vendor only on production of the certificate of fitness for occupation of the chief building surveyor in respect of the building.

Clause 10 of the sale agreement provided that the vendor should at its own expense obtain the approval of the competent authority to the necessary subdivision.

Clause 11 of the sale agreement is the crucial one. In reading the clause it will be convenient to divide it into its component parts.

> (A) The sale and purchase herein shall be completed at the office of the vendor's solicitors 14 days after the receipt by the purchaser or his solicitors of the notice to complete of the vendor's or of its solicitors such notice to be accompanied by the vendor's architects' certificate that the building and road drainage and sewerage works have been completed in accordance with the relevant approved plans and that sewerage, water and electricity and/or gas services have been duly connected to the building and that the said approval of the competent authority for subdivision has been obtained.
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> (B) On completion, the vendor shall make and execute to the purchaser an assurance of the property sold such assurance to be prepared by and at the expense of the purchaser.
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> (C) The said notice to complete shall be given by the vendor on or before 30 June 1973 or such other subsequent date or dates as may after the date hereof be appointed by the Controller of Housing.
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> (D) If the vendor shall fail to give the said notice to complete on the appointed date the vendor shall pay to the purchaser liquidated damages calculated from day to day in respect of the period commencing from the appointed date up to the date when the said notice to complete shall have actually been given at the rate of 9% per annum on the purchase price such interest to be paid and deducted from the balance of the purchase price payable on completion.

Clause 12 provides for the handing over of vacant possession on completion -

Upon payment of the whole of the purchase price and interest (if any), and all other moneys as may be due by the purchaser to the vendor in respect of the building or under this agreement and upon completion of the sale and purchase herein vacant possession of the property sold shall be delivered to the purchaser.

On the true construction of Clauses 11 and 12 of the sale agreement there were four pre-requisites of a valid notice to complete. First, there must be an architects certificate relating to the buildings, services, *etc*.; secondly, there must be approval for subdivision; thirdly, the vendor must be in a position to execute an assurance of the property in favour of the purchasers: and fourthly, the vendor must be in a position to deliver vacant possession to the purchasers.

The Controller of Housing appointed 31 December 1973 ("the appointed day") as the day on or before which the notice to complete should be given by the vendor under cl. 11 of the sale agreement. There was considerable delay on the part of the vendor in completing the buildings, which was not finished until November 1974.

On 28 November 1974 ("the licence date") a licence for the temporary occupation of the building was given for a period of three months expiring on 27 February 1975. On 1st December 1974 the vendor offered to hand over possession of the house to the purchasers. The purchasers did not accept that offer when made. Instead, their solicitors wrote on 11 December to the vendor's solicitors saying,

Our clients have received a letter from your clients that the house on the above property can be handed over to them.

Please let us have your clients' notice of completion in accordance with cl. 11 of the contract and note that our clients are claiming liquidated damages under the said cl. 11.

However, the purchasers did accept the offer subsequently and went into possession on 17 April 1975 ("the possession date"). The original temporary occupation licence had by then expired, but it is right to make the assumption that the parties were not committing a criminal offence and that a further licence was issued.

On 7 December 1975 ("the completion date") the vendor served a notice to complete pursuant to cl. 11 of the sale agreement. The vendor says that the delay in serving the notice was due to its inability to obtain from the authorities the requisite certificate of title.

Shortly thereafter the purchasers commenced proceedings against the vendor claiming liquidated damages in a sum representing 9% per annum on the purchase price calculated over a period extending from the appointed day to the possession date (not the completion date). On 1 April 1977 the purchasers were given leave to enter judgment against the vendor on a sum representing 9% per annum on the purchase price from the appointed day to the licence date (less an irrelevant deduction), leave being given to proceed to trial for the balance of the claim. On 5 May 1977 the purchasers increased the balance of their claim by an amendment to the pleadings seeking liquidated damages calculated down to the completion date.

The action came before the High Court and was decided in favour of the vendor. The issue as defined by the learned Judge was confined to the question whether the vendor was liable to pay damages in respect of the period from the licence date to the completion date. The learned Judge decided that issue in favour of the vendor. He said that the purchasers had no valid reason for not taking possession on the licence date. He regarded the purchasers'

claim as in essence a claim for compensation for financial loss suffered by them between the licence date and the completion date. It was therefore necessary to ascertain what loss they suffered during that period. They suffered none between the licence date and the possession date because they could have been in occupation, and none between the possession date and the completion date because they were in fact in occupation.

Counsel for the vendor submitted three propositions to their Lordships.

First, that on the true construction of the sale agreement the provision in cl. 11 for the payment of liquidated damages in the event of delay in serving notice to complete only applied so long as there was delay, not merely in serving that notice, but also in offering vacant possession; so that, it was argued, liquidated damages ceased to accrue at the rate of 9 percent per annum on the purchase price after the offer of vacant possession had been made, although the notice to complete was still outstanding. Their Lordships see no justification for such a construction of the sale agreement. The wording of cl. 11 is plain. Damages are to be "calculated from day to day in respect of the period commencing from the appointed date up to the date when the said notice to complete shall have actually been given". Nothing could be clearer. There was no obligation on the purchasers to accept possession before completion. The vendor could not curtail the right of the purchasers to liquidated damages by making an offer of possession which the purchasers were not bound to accept.

Secondly, it was submitted that if on the true construction of the sale agreement the liability to pay compensation at the rate of 9% per annum on the purchase price continued to accrue notwithstanding that possession was offered, such compensation was not a genuine pre-estimate of the damage likely to be caused by delay in completion, but was penal in its nature and void. In such a case the compensation would be paid only for the delay in perfecting the title of the purchasers. Delay in making title, without default on the vendor's part, is not the proper subject matter of damages at common law; *Rowe v. School Board for London* [1887] 36 Ch D 619. Counsel for the vendor accepted that the validity of an agreement for liquidated damages must be assessed at the date when the contract is made, and not judged by reference to later events. But here, it was argued, if the compensation was payable whether the delay was in making title or in offering possession, it would be payable at the same rate on the happening of either of two events involving markedly different scales of injury. Compensation so agreed could not be a genuine pre-estimate of the damage likely to be caused by the breach. See *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.* [1915] AC 79, 87.

An argument that the agreement for payment of liquidated damages is a penalty faces a formidable problem at the outset. The sale agreement takes a statutory form, in the sense that it was bound to follow the precedent laid down in 1967 by the Minister of Law and National Development, acting under his statutory power to make rules to provide for the form of contract to be used by a licensed housing developer. The vendors' argument is therefore an invitation to the board to find that the official form of contract from which *prima facie* the vendor and the purchasers could not lawfully depart, and which must have been used in countless transactions over the last 15 years, is nevertheless unconscionable and void.

Even if that problem is surmounted, and if it is also assumed that the principle of *Rowe's* case forms part of the law of Singapore, and that the delay was not the fault of the vendor, their Lordships see a fundamental objection to the vendor's argument. The agreement for liquidated damages was not directed to different categories of breach of contract, but to a

single sort of breach, namely, a delay in serving notice to complete. As their Lordships have already indicated, the purchasers were not bound to pay the least attention to an offer of vacant possession unless and until notice to complete was served. The offer in the present case of vacant possession before completion was never a part of the sale agreement, but was an event altogether outside the contract. It cannot therefore be taken into account in assessing the validity of the agreement for compensation for delay in serving a notice to complete.

Lastly, the vendor sought to argue that on the true construction of the sale agreement, the assumption by the purchasers of possession caused liquidated damages to cease to accrue on the possession date. This was the claim originally made by the purchasers in the writ and statement of claim before the latter was amended. The vendor's counsel put this argument forward as matter of construction of the sale agreement. It was not asserted that the offer and acceptance of premature possession gave rise to any implied variation of the sale agreement, or any waiver of the right to interest after the possession date. It does not appear that this argument was advanced in the Courts below, and it is not foreshadowed in the appellant's case. But apart from this objection, the argument is unsound. The sale agreement does not contain either expressly or by necessary implication the term for which the appellant contends. That is the short answer to the point and it does not lend itself to expansion.

The appeal is therefore dismissed. The appellant, the vendor, must pay the costs of the appeal.

Also found at [1982] CLJ 527